

**TCEQ DOCKET NO. 2005-1490-WR
SOAH DOCKET NO. 582-10-4184**

APPLICATION BY THE BRAZOS RIVER AUTHORITY FOR WATER USE PERMIT NO. 5851	§ § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
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**NATIONAL WILDLIFE FEDERATION’S RESPONSES TO EXCEPTIONS
TO THE PROPOSAL FOR DECISION**

COMES NOW, the National Wildlife Federation (NWF) and files its Responses to Exceptions to the Proposal For Decision (PFD) and would show as follows:

NWF responds, in this document, primarily to the Exceptions filed by the Brazos River Authority and the Executive Director. NWF’s responses are grouped by issue area.

The Two-Step Process

In responding to the PFD’s discussion about the legal shortcomings of the two-step process, BRA characterizes the PFD as creating a classic chicken or egg conundrum. BRA Exceptions at p. 1. However, the conundrum really only arises because BRA wants to have a guarantee of a full chicken dinner without first going through the process of incubating the egg and raising the chicken. That is an unreasonable position, particularly because, without adequate safeguards, BRA would be dining at the expense of other water rights holders and the environment.

The rejection of the two-step process does not create a scenario that would require BRA to make some huge investment, such as building a reservoir, before obtaining a water right permit. All the rejection of BRA’s current application would require is for BRA to actually prove up, through the development of a new application which includes an initial water management plan (WMP), that the amount of water it seeks actually can be made available and accounted for without resulting in undue adverse impacts before it obtains a permit or a commitment to receive a permit. As has been acknowledged by the ED and BRA in the various recommended versions of a draft permit, potential new parties must receive notice and be afforded the opportunity to participate in any such proceeding that involves consideration of a WMP. Simply abating the hearing or entering an interim order can’t resolve the deficiencies in the application.

In addition, BRA should be required to show how much of the water that can be made available at one or more realistic diversion points can actually be put to beneficial use. It is true that a water right can be amended to add diversion points, ED Exceptions at p. 3, but that initial right first must be evaluated and authorized based on at least one realistic diversion point and rate. In addition, the amount authorized for diversion must be justified. It simply makes no sense to grant BRA a right for a certain amount of water that can only be made available at a location far downstream on the Brazos, where diversion facilities don't exist and are not planned, if the need for the water exists in the upper reaches of the river. Requiring such a showing is not an unreasonable burden as a prerequisite to obtaining a perpetual water right and it is what the Texas Water Code requires. The standard for the beneficial use showing must be greater than simply pointing to a projected demand somewhere in the regional water plan without showing that the requested water reasonably can be expected to be applied to help meet that demand.

BRA suggests, without any supporting evidence, that the requested right can somehow help to alleviate water shortages for existing water rights, which would be senior to any right granted to BRA, in the current drought. BRA Exceptions at pp. 10-11. The evidence indicates that BRA has a great deal of water that it is authorized to use and which is in excess of actual use under its existing water rights and existing contracts. Exh. BRA 37 at p. 4. The evidence also shows that BRA makes that water available for sale to customers who are willing to pay for it. If that water isn't alleviating the current shortages, there is no basis in the record for asserting that granting a new permit in the next few years will.

BRA further argues that it shouldn't, or can't, be expected to develop a water management plan now without more certainty about exactly what rights it has been, or will be, granted. It seeks to accomplish that result through entry of an interim order that, in effect, grants BRA all of the rights it seeks but shelters that grant from judicial review. As the ALJ's concluded, for a number of well-founded reasons, without a WMP to review it isn't possible to determine what rights can be granted in compliance with regulatory requirements. An interim order can't cure that deficiency.

With the possible exception of uncertainty about the level of accounting plan details addressing return flows, BRA's argument about the difficulty of developing a WMP in advance of permit decisions lacks merit. The basic structure of the WMP is unlikely to change simply because of a change in the amount of water authorized for diversion or the diversion location. The WMP must be designed to be able to deal relatively easily with those types of changes in order for BRA's approach to be workable. And, even for the reuse authorization for return flows, regardless of the theory under which the authorizations are

granted, the WMP must include an accounting method that is detailed enough to ensure, on an ongoing basis, that more water isn't being diverted than is being discharged. The WMP also must account for reuse authorizations subsequently issued to others that, under the proposed permit, would be allowed to interrupt BRA's authorization. See, e.g., Exh. ED-K-2 Special Condition 6.A.13). The Executive Director reasonably argues that the return flow accounting method would need to be comprehensive in order to protect water rights and the environment regardless of the theory under which reuse is authorized. ED Exceptions at p. 5. So, even for the reuse issue, BRA needs to demonstrate through a draft WMP that the far-reaching reuse authorization it seeks can be adequately tracked and enforced.

The simple reality is that without a complete application, including a draft WMP, issues are presented only in the abstract and facts are not available to ascertain compliance with regulatory prerequisites for permit issuance.

A draft WMP is needed in order to evaluate the application for consistency with regulatory requirements. Clearly, BRA does not want to undertake that exercise until it has, actually or in practical effect through an interim order, been granted a permit. It certainly is understandable why BRA would prefer that option. However, once such a grant has been made, there are only very limited mechanisms for rescinding it through cancellation proceedings. That is why the Water Code establishes clear statutory prerequisites to permit issuance. The flexibility that BRA seeks can be authorized, if at all, only after BRA has demonstrated through the submission of an application which includes a draft WMP that regulatory requirements will be met and that sufficient transparency can be achieved to ensure that existing rights, instream uses, and the public interest will be protected.

The Executive Director argues that flexibility is needed in managing new water rights. ED Exceptions at p. 3. The ED references the limited permit reopener provisions of Sections 11.147 (e-1) through (e-3) of the Water Code as examples of that new flexibility. Significantly, that "flexibility" was specifically authorized by statute and only within very specific parameters prescribed by the Legislature. Although NWF acknowledges that a certain amount of flexibility in permitting may be appropriate, TCEQ needs to establish, through a rulemaking process, a regulatory structure to govern that flexibility consistent with statutory requirements. An individual water right hearing and permit is a poor mechanism to use for establishing an entire, elaborate water management plan process.

The Executive Director argues for approval of a two-step process by equating the WMP to an accounting plan. ED Exceptions at p. 3. However, as the PFD discussion makes clear, PFD at p. 164, they are two very

different things. An accounting plan is simply the mechanism for determining compliance with explicit conditions in a permit. The WMP contemplated here is an entirely new, and unprecedented, kind of document that would actually establish many of the permit requirements.

BRA argues that the City of Irving amendment to authorize reuse of developed water imported from the Sulphur River basin serves as a precedent for the two-step process. BRA Exceptions at p. 11. However, that was a very different proceeding not only because it involved an amendment but because it involved only the issue of developed water being introduced into the Trinity River Basin. Exh. ED-A1. The limited impact of that initial decision was to prevent reliance upon that developed water. See Exh. ED-A1 at COL 4. The Commission determined that the requirements of Section 11.134 (b) did not apply. *Id.* at COL 5. In addition, the Commission included a specific Ordering Provision No. 2 for the express purpose of limiting any perceived precedential impact of its decision: “The Commission added new Ordering Provision 2 to limit the impact of the findings, conclusions, and determination and decision in this case to the subject amendment.” Exh. ED-A1 at p. 9 (Explanation of Changes to ALJ’s October 24, 2005 Order). Ordering Provision No. 2 provides: “The Findings of Fact and Conclusions of Law set forth and the determination and decision made herein only apply to the facts relating to the subject amendment, Certificate of Adjudication No. 03-4799C.”

Reliance On Nonexistent Storage

Both the ED and BRA argue that BRA should be issued a new appropriation of state water based on storage in BRA’s reservoirs that is acknowledged not to exist. The ED seems to suggest, ED Exceptions at p. 7, that failing to issue that new appropriation is equivalent to amending BRA’s existing rights to reduce its storage authorizations. The issue here is whether BRA should be granted a new appropriation amount, over and above its existing water rights, that will be available only through the creation of storage that doesn’t currently exist. NWF is not aware of any argument made in this hearing that BRA’s existing rights should be amended to reduce the amount of authorized storage.

Treatment of Allens Creek Reservoir

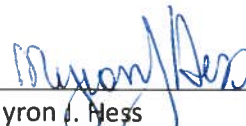
Regarding Allen’s Creek Reservoir, the ED’s argument, ED Exceptions at p. 8, is confusing. The simple fact is that under Texas law water can only be appropriated once. The ED’s draft permit, Exh. ED-K-2 Provision 1.A.2), includes in the “new appropriation amounts” water that has already been appropriated to BRA and the City of Houston as part of the existing water right for the Allens Creek Reservoir. Short of cancellation that water simply is not available for a new appropriation to anyone. NWF believes that the

owners of the right can apply to amend the right to authorize its use as part of the BRA system. They also can seek a term permit to use the water for a specific term of years. However, BRA can't obtain a new appropriation of that water while the existing permit is still in effect.

Conclusion

The National Wildlife Federation believes that the ALJs correctly determined that BRA has not met the requirements for issuance of the requested permit and requests that the exceptions of BRA and the ED, as discussed above, be denied. The entry of some form of interim order is not an adequate method for addressing the deficiencies in BRA's application

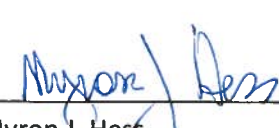
Respectfully Submitted



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CERTIFICATE OF SERVICE

I hereby certify, by my signature below, that on November 17, 2011 a true and correct copy of the above and foregoing **National Wildlife Federation's Response to Exceptions to the Proposal For Decision** was forwarded via e-mail or First Class Mail to the parties on the attached Service List.



Myron J. Hess

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SOAH DOCKET NO. 582-10-4184

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